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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PILLAR POINT PROJECT DEVELOPERS, LLC, Plaintiff and Appellant, v. ANDREINI BROTHERS, INC., Defendant and Respondent.	A143065 (San Mateo County Super. Ct. No. CIV-526041)

Plaintiff Pillar Point Project Developers, LLC (Pillar Point) appeals from a judgment following the trial court's order denying its petition to compel arbitration of a dispute about construction costs.

We affirm. Pillar Point failed to meet its threshold burden to show that it entered a contract with defendant Andreini Brothers, Inc. (Andreini Brothers) or that the two had an agreement to arbitrate.[1]

[1] Although in its notice of appeal Pillar Point stated that it also would seek review of the trial court's order awarding attorney fees, it does not mention the issue in its appellate briefing. Accordingly, we treat that issue as waived. (See *In re Tobacco Cases I* (2011) 193 Cal.App.4th 1591, 1602 [" '[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's . . . issues as waived' "].) We do not discuss facts related to that issue in this opinion.

I. BACKGRUND

A. Pillar Point's Petition to Compel Arbitration

On December 31, 2013, Pillar Point petitioned for an order compelling Andreini Brothers to arbitrate a dispute about construction costs. The petition alleged that, in October 2006, Andreini Brothers entered a written general contractor agreement with Pillar Point to perform work on a project at Pillar Point Harbor, in Princeton, California (the Harbor Village Project). The project apparently included construction of a hotel, with surrounding lots, sidewalks, and parking facilities.

According to the petition, although Andreini Brothers was provided construction plans and specifications requiring sidewalks and other features that complied with the Americans with Disabilities Act (ADA), the work it completed was not ADA compliant. As a result, in September 2010, the petition alleged, Pillar Point was named as a defendant in a separate lawsuit that sought injunctive relief on behalf of physically disabled persons. Although Pillar Point notified Andreini Brothers of the action, requesting that it correct the deficiencies, Andreini Brothers allegedly refused.

Pillar Point alleged that it settled the ADA litigation in May 2011, and then hired others to perform the required remedial work. By October 2012, it alleged, its total costs related to the litigation were $65,669.64. Apparently unable to obtain this amount from Andreini Brothers, Pillar Point eventually petitioned the trial court for an order compelling arbitration, offering no explanation for having delayed until December 2013 to do so.[2]

Pillar Point did not attach to its petition a copy of the general contractor agreement that it claimed to have with Andreini Brothers. The petition did quote the arbitration provision, however, allegedly "paragraph 17" of the agreement. According to the petition, it read as follows: "Arbitration of Disputes [¶] *Owner and Contractor agree* that any dispute or claim, in law and/or in equity, arising between them out of this Agreement, or any matter relating thereto, which is not settled by written agreement, or through any

[2] Despite its unexplained delay, Pillar Point indicated it would be seeking interest on the amount it had been forced to expend for the litigation.

voluntary mediation, shall be decided by binding, neutral arbitration. The arbitrator shall be a retired judge or justice, or an attorney with at least five (5) years of construction law experience, unless the parties mutually agree to a different arbitrator, in writing." (Italics added.)

B. Andreini Brothers' Opposing Papers

Andreini Brothers filed a response, requesting denial and dismissal of the petition, and disputing several key facts. Most significantly, Andreini Brothers denied that it ever entered into a contract with Pillar Point, or that it had been a general contractor on the Harbor Village Project. Although it agreed it had performed work on the project pursuant to a written agreement, it maintained that its agreement was with an *individual*, Keep Nathan, doing business as KN Properties (Nathan), not Pillar Point, and that the agreement provided Andreini Brothers would perform its work as a *subcontractor*, not a general contractor. According to Andreini Brothers, Nerhan was a general contractor on the project.[3]

As proof of its contentions, Andreini Brothers provided the court with a declaration from Andreini Brothers president Mario Andreini, and a copy of its agreement with Nerhan (the "Subcontractor Agreement"). That agreement provided that it was between "the *Subcontractor*: [Andreini Brothers, Inc.]" and "[t]he *"Contractor*: [Keet Nerhan, dba KN Properties]," for work on the Harbor Village Project, "[o]wned by: [Pillar Point]." (Italics added.) The final paragraph confirmed that the Subcontractor Agreement "set[] forth all the covenants, promises, agreements, conditions and understandings *between Contractor* [*Nerhan*] and *Subcontractor* [*Andreini Brothers*] concerning the [Harbor Village] [P]roject . . . ." (Italics added.)

The Subcontractor Agreement also included, as paragraph 18, a provision entitled "Arbitration of Disputes," but, unlike the language alleged in the petition ("Owner and Contractor agree") this arbitration clause referred to an agreement between the

[3] Andreini Brothers also contended that it entered the Subcontractor Agreement in August 2004, rather than in October 2006, as the petition alleged.

"Contractor and Subcontractor."[4] Based on these differences Andreini Brothers contended that Pillar Point's petition must have been quoting the arbitration paragraph contained in the general contractor agreement it had with Nerhan and not the arbitration paragraph contained in the Subcontractor Agreement. The latter did not mention, or purport to incorporate, any agreement with Pillar Point, and Andreini Brothers' president confirmed in his declaration that his company had no other contract with Pillar Point. Because there was no evidence of any arbitration agreement between the two parties, Andreini Brothers sought dismissal of the petition. Dismissal also was appropriate, it contended, because Pillar Point waited too long to file its petition, waiving any right it arguably could have had to compel arbitration.

C. Pillar Point's Reply Papers

Pillar Point subsequently filed a document that it characterized as a motion to compel arbitration, and supporting papers, which collectively functioned as—and will be described in this opinion as—reply papers. The submission included a supporting declaration from Keet Nerhan, explaining that he was "principal owner" of *both* Pillar Point, a limited liability company, which developed and owned the Harbor Village Project, and KN Properties, the general contractor for the project. Pillar Point agreed that Nerhan and Andreini Brothers had executed the Subcontractor Agreement, and it now claimed *this* was the agreement referenced in its petition.[5] Pillar Point's counsel provided a declaration supporting this new theory, averring that the subcontractor agreement was a "true and correct copy of the Arbitration Agreement entered into between [Pillar Point] as the owner, and KN Properties as the General Contractor and [Andreini Brothers] as the sub-contractor."

[4] The arbitration paragraph in the Subcontractor Agreement is several sentences longer than the paragraph quoted in the petition.

[5] Pillar Point belatedly provided a copy of the Subcontractor Agreement with its reply papers, although it did not suggest its version differed in any respect from the one that Andreini Brothers previously had provided.

The reply papers did not acknowledge (or offer an explanation for) the contradiction between the facts now submitted in Pillar Point's reply papers and those originally offered in its petition. They did not explain, for example, why Pillar Point had alleged in its petition that Andreini Brothers was a general contractor on the Harbor Village Project (although it now conceded Andreini Brothers had been a subcontractor), or why it had quoted the alleged arbitration paragraph as confirming an agreement between "Owner and Contractor" (although it now quoted the same paragraph as confirming an agreement between "Contractor and Sub-contractor"). Instead of addressing these and other discrepancies,[6] Pillar Point simply contended generally in its reply papers that "the parties" had an "agreement" to arbitrate, and that "enforcement of Arbitration by a third party beneficiary or a principal, as here, is appropriate," citing *Outdoor Services v. Pabagold* (1986) 185 Cal.App.3d 676, 684. Pillar Point did not seek leave to amend the petition.

D. Andreini Brothers' Surreply

Andreini Brothers submitted a surely (styled as a "reply" to Pillar Point's "motion"). It contended the court should disregard Pillar Point's reply papers because they were procedurally improper and presented a new theory, contradicting judicial admissions that Pillar Point made in its petition. It also reasserted the arguments from its earlier opposition papers, that Andreini Brothers had not entered into an arbitration agreement with Pillar Point, and Pillar Point in any event had waived its right to petition to compel arbitration by waiting too long to act.

E. The Trial Court Hearing and Ruling

At the trial court's hearing on the petition, Pillar Point relied entirely on the theory it had only briefly raised in his reply papers, i.e., that Pillar Point was entitled to enforce the arbitration paragraph contained in the Subcontractor Agreement as an intended third-

[6] Additional discrepancies include the date of the agreement (alleged in the petition to be October 2006, although the Subcontractor Agreement was dated August 11, 2004), and the location of the arbitration provision (alleged in the petition to be paragraph 17, although it was paragraph 18 in the Subcontractor Agreement).

party beneficiary. Pillar Point contended that, because it was the owner and developer of the property on which Andreini Brothers was to perform its work, that work was intended to benefit Pillar Point's project. In addition—raising a new point for the first time at that hearing—Pillar Point observed that the Subcontractor Agreement required Andreini Brothers to obtain comprehensive liability insurance naming Pillar Point as an insured, and this confirmed that Pillar Point was an intended third-party beneficiary of the agreement and entitled to enforce it.

Andreini Brothers responded that Pillar Point's original petition had sought to enforce a general contractor agreement, which could only have been between Pillar Point and Nerhan; that the petition did not accurately allege any agreement between Pillar Point and Andreini Brothers; that there was no evidence Pillar Point qualified as a third-party beneficiary of the Subcontractor Agreement (an argument that was contradicted by the petition in any event); and that Pillar Point had waived its right to compel arbitration by waiting for more than three years after the ADA litigation commenced to seek enforcement of the alleged agreement.

After both sides concluded their arguments, and apparently unsaid by the new argument Pillar Point's counsel had just articulated, the trial court ruled from the bench. Adopting its tentative decision, it declined to compel arbitration, ruling Pillar Point had not met its burden of proof. Specifically, the court found Pillar Point had not established by a preponderance of the evidence that Andreini Brothers (1) "was a party to any contract" with Pillar Point, or (2) had "entered into an arbitration agreement, of an kind" with Pillar Point. It entered judgment in favor of Andreini Brothers.

II. DISCUSSION

A. Relevant Legal Principles

"Code of Civil Procedure section 1281.2 . . . provides a procedure by which a party may petition the court to order arbitration of a controversy."[7] (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 406 (*Rosenthal*).) The proceeding

[7] All further statutory references are to the Code of Civil Procedure. All references to rules in this opinion are to the California Rules of Court.

" ' "is in essence a suit in equity to compel specific performance of a contract." ' [Citations.]" (*Id.* at p. 411.) Under the statutory scheme, a trial court makes "a summary determination of the petition" in the manner provided for hearing and deciding motions generally. (*Id.* at pp. 407, 409.) Facts ordinarily "are to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion." (*Id.* at pp. 413-414.)

A party seeking to compel arbitration "bears the burden of proving [the] existence [of the agreement to arbitrate] by a preponderance of the evidence." (*Rosenthal, supra*, 14 Cal.4th at p. 413.) It may meet its burden by complying with rule 3.1330. (*Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 765).)[8] That rule provides: "A petition to compel arbitration . . . pursuant to Code of Civil Procedure section[] 1281.2 . . . must state . . . the provisions of the written agreement and the paragraph that provides for arbitration. The provisions must be stated verbatim or a copy must be physically or electronically attached to the petition and incorporated by reference." (Rule 3.1330.) Once a petitioner alleges the existence of an arbitration agreement and supports the allegation as provided in rule 3.1330, the burden shifts to the party opposing the petition to prove "by a preponderance of the evidence[] any fact necessary to [its] defense" against enforcement of the agreement. (*Rosenthal, supra*, at p. 413 [a petition to compel arbitration must be "accompanied by prima facie evidence of a written agreement to arbitrate the controversy"].)

" 'There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]' [Citation.]" (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60.)

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[8] The *Hotels Nevada* decision referred to former rule 371, which was renumbered as rule 3.1330 and amended in 2007, without substantive change. (See *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 845, fn. 8 (*Ruiz*).)

B. Analysis

The trial court denied Pillar Point's petition to compel arbitration, finding there was insufficient evidence that it had entered a contract or arbitration agreement with Andreini Brothers. We agree.

Pillar Point did not meet its threshold burden by presenting prima facie evidence that it had a written agreement with Andreini Brothers. Although it alleged the existence of a written agreement, and quoted an alleged arbitration paragraph, it did not "state . . . the provisions of the written agreement . . . . verbatim" or attach a copy. (Rule 3.1330; see *Condi v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 218.) Quoting an arbitration paragraph alone is insufficient, as the facts in this case illustrate.

The arbitration paragraph quoted in Pillar Point's petition did not specifically name the parties who allegedly agreed to arbitration. And, when Pillar Point later did present the written agreement upon which it asserted its right to arbitration, the agreement did not match the allegations of its petition. While the petition had claimed Andreini Brothers and *Pillar Point* had a *general contractor* agreement, this new document was a subcontractor agreement between Andreini Brothers and Nerhan. And, while the petition quoted the arbitration clause as providing that "*Owner* [*Pillar Point*] *and Contractor* [*Andreini Brothers*]" (italics added) agreed to arbitrate their disputes, the contract proffered by Pillar Point in its "motion" actually provided that "Contractor [Nerhan] and Subcontractor [Andreini Brothers]" agreed to arbitrate *their* disputes. The Subcontractor Agreement therefore did not provide prima facie evidence supporting the allegations of the petition.

"The party seeking to enforce an arbitration provision . . . must establish the provision it seeks to enforce is the same provision to which the parties agreed." (*Avery v. Integrated Health Care Holdings, Inc., supra*, 218 Cal.App.4th at p. 67.) Pillar Point did not meet this burden. It did not make a threshold showing it had any direct agreement with Andreini Brothers. "[T]he existence of [a] contract is a question of fact, and we must uphold the trial court's finding if supported by substantial evidence." (*Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.* (2015) 240 Cal.App.4th

763, 772.) In this case, substantial evidence supported the trial court's finding that Pillar Point did not prove the existence of the contract described in its petition.

Nor could Pillar Point cure its initial failure by changing horses midstream. Not until it filed its reply papers did Pillar Point identify the Subcontractor Agreement as the basis for its petition. In *Ruiz* the Court of Appeal rejected a similar effort. There, an employer petitioned for an order compelling arbitration based on an agreement allegedly bearing an employee's electronic signature. (*Ruiz, supra*, 232 Cal.App.4th at p. 838.) After the employee challenged the signature, however, the court concluded the employer had not presented sufficient evidence to show the employee had been the one to affix the signature electronically. (*Id.* at p. 842.) The employer then contended that the employee had previously signed other agreements. The court rejected that argument, declining to consider those other agreements, because the employer "did not adduce [them] in its petition, and did not mention [them] until it filed its reply papers." (*Id.* at p. 846, citing *Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc.* (1995) 31 Cal.App.4th 1323, 1333 [grounds for relief first raised in reply papers in the trial court are not properly presented to the trial court and are not properly before the appellate court].)

The trial court here correctly rejected the argument that Pillar Point raised for the first time in its reply papers, i.e., that the Subcontractor Agreement between Nerhan and Andreini Brothers, and Pillar Point's alleged status as a third-party beneficiary to that contract, provided an alternative basis for an order compelling Andreini Brothers to arbitrate. If, as noted above, "[a] petition to compel arbitration ' "is in essence a suit . . . to compel specific performance of a contract" ' " (*Rosenthal, supra,* 14 Cal.4th at p. 411), it stands to reason that a petitioner may not alter its theory during the pendency of a proceeding, suddenly seeking to compel performance under an entirely different contract. Just as "the pleadings set the boundaries of the issues to be resolved at summary judgment" (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648), reasonably the petition must set the boundaries for one seeking to compel arbitration under section 1281.2. A party seeking to rely upon an agreement not described in its petition logically must move to amend the petition before the hearing on

its request. (See, e.g., *ibid.* ["a plaintiff wishing 'to rely upon unleaded theories to defeat summary judgment' must move to amend the complaint before the hearing"]; *City of Hope v. Bryan Cave, L.L.P.* (2002) 102 Cal.App.4th 1356, 1369 ["the rules covering complaints are applicable to petitions to arbitrate"].)

Even assuming Pillar Point's failure to prove the allegations contained in its petition was not fatal, and even if Pillar Point had provided sufficient facts and law to support its claim to be a third-party beneficiary of the contract, its petition still fails. " '[T]he contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration: "Although '[t]he law favors contracts for arbitration of disputes between parties' [citation], ' "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate . . . ." ' [Citations.] In determining the scope of an arbitration clause, '[t]he court should attempt to give effect to the parties' intentions, in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [citation].' " ' [Citation.] '[T]he terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested.' " (*Rice v. Downs* (2016) 247 Cal.App.4th 1213, 1223, as modified on denial of rehearing (June 23, 2016), as modified (June 28, 2016), review denied (Aug. 24, 2016).) Here, the "dispute as to which arbitration is requested" is Pillar Point's claim against Andreini Brothers for indemnity due to its alleged failure to complete its work in a manner that is compliant with the ADA. This dispute is not covered by the plain language of the arbitration clause which provides that the contractor and subcontractor agree to arbitrate "any dispute or claim . . . arising *between them* out of this Agreement." (Italics added.) Whether or not Pillar Point is a third-party beneficiary of the Subcontracting Agreement, it cannot enlarge the scope of the arbitration clause to include disputes between itself—the Owner—and Andreini Brothers. [9]

[9] In light of our decision, we need not address Andreini Brothers' argument that Pillar Point has waived any rights it might have had to demand arbitration due to its lengthy delay in pursuing this claim.

III. DISPOSITION

The judgment is affirmed. Andreini Brothers is to recover its costs on appeal.

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Rivera, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.